

Administrative Subpoenas in Criminal Investigations: A Brief Legal Analysis

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Summary

Administrative subpoena authority is the power vested in various administrative agencies to compel testimony or the production of documents or both in aid of the agencies' performance of their duties. Administrative subpoenas are not a traditional tool of criminal law investigation, but neither are they unknown. Several statutes authorize the use of administrative subpoenas primarily or exclusively for use in a criminal investigation in cases involving health care fraud, child abuse, Secret Service protection, controlled substance cases, inspector general investigations, and tracking unregistered sex offenders.

Proponents cite administrative subpoenas as a quick, efficient, and relatively unintrusive law enforcement tool. Opponents express concern that they may result in unchecked invasions of privacy and evasions of the Fourth Amendment warrant and probable cause requirements.

The courts have determined that, as long as they are not executed in a manner reminiscent of a warrant, administrative subpoenas issued in aid of a criminal investigation must be judicially enforced if they satisfy statutory requirements and are not unreasonable by Fourth Amendment standards.

The Child Protection Act of 2012, P.L. 112-206 (H.R. 6063) authorized the United States Marshals Service to issue administrative subpoenas in aid of tracking unregistered sex offenders.

This report is available abridged—without footnotes, appendixes, and most of the citations to authority—as CRS Report RS22407, *Administrative Subpoenas in Criminal Investigations: A Sketch*, by Charles Doyle.

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Background

Administrative subpoena authority is the power vested in various administrative agencies to compel testimony or the production of documents or both in aid of the agencies' performance of their duties. Although most prevalent in a regulatory environment, administrative subpoenas may be used in a limited range of criminal investigations, such as those of the various inspectors general or inquiries into possible health fraud or sex offenses committed against children.

During the 108th Congress, the President urged Congress to expand and reinforce statutory authority to use administrative subpoenas in criminal investigations, and legislation was introduced for that purpose.¹ Yet the 109th Congress² and those thereafter saw only modest proposals. In the 110th, Congress did create an inspector general's office for the Architect of the Capitol with administrative subpoena power comparable to that enjoyed by other inspectors general.³ It also expanded the administrative subpoena power available in certain child sex offense investigations to include investigations of sex trafficking.⁴ Since then, proposals relating to the use of administrative subpoenas in criminal investigations have been confined to unregistered sex offenders,⁵ of the type ultimately enacted as part of the Child Protection Act of 2012.⁶

Proponents of the expanded use of administrative subpoenas emphasize their effectiveness as an investigative tool and question the logic of their availability in drug and health care fraud cases

¹ "Congress should change the law, and give law enforcement officials the same tools they have to fight terror they have to fight other crime. Here's some examples. Administrative subpoenas, which enable law enforcement officials to obtain certain records quickly, are critical to many investigations. They're used in a wide range of criminal and civil matters, including health care fraud and child abuse cases. Yet, incredibly enough, in terrorism cases, where speed is often of the essence, officials lack the authority to use administrative subpoenas. If we can use these subpoenas to catch crooked doctors, the Congress should allow law enforcement officials to use them to catch terrorists," President George W. Bush, *Progress Report on the Global War on Terrorism* (Sept. 10, 2003), available at <http://www.whitehouse.gov/news/releases/2003/09/20030910-6.html>; See also, H.R. 3037 (Rep. Feeney); S. 2555 (Sen. Kyl); S. 2679; (Sen. Kyl); H.R. 3179 (Rep. Sensenbrenner); all in the 108th Congress; see also, *Tools to Fight Terrorism: Subpoena Authority and Pretrial Detention for Terrorists: Hearing Before the Subcomm. on Terrorism, Technology and Homeland Security of the Senate Comm. on the Judiciary (Senate Hearings I)*, 108th Cong., 2d Sess. (2004); *A Review of the Tools to Fight Terrorism Act: Hearing Before the Subcomm. on Terrorism, Technology, and Homeland Security of the Senate Comm. on the Judiciary (Senate Hearings II)*, 108th Cong., 2d Sess. (2004), Member and witness statements available at <http://judiciary.senate.gov>.

Earlier versions of this report included a discussion of national security letter authority. "National Security Letters," used in national security investigations rather than criminal investigations and which resemble administrative subpoenas in many respects, are beyond the scope of this report, but are the subject of separate reports: CRS Report RL33320, *National Security Letters in Foreign Intelligence Investigations: Legal Background and Recent Amendments*, and CRS Report RS22406, *National Security Letters in Foreign Intelligence Investigations: A Glimpse of the Legal Background and Recent Amendments*, both by Charles Doyle.

² E.g., S. 600 (Sen. Lugar), H.R. 3726 (Rep. Pence), H.R. 4170 (Rep. Sessions).

³ P.L. 110-161, §1301, 121 Stat. 2240 (2007), 2 U.S.C. 1808(c)(1)(B)(ii).

⁴ P.L. 110-457, §224(b), 122 Stat. 5072 (2008), amending, 18 U.S.C. 3486(a)(1)(D).

⁵ H.R. 6266 (111th Cong.), S. 2925 (111th Cong.), S. 2972 (111th Cong.); H.R. 1981 (112th Cong.), H.R. 6063 (112th Cong.), S. 596 (112th Cong.), S. 1308 (112th Cong.), S. 1338 (112th Cong.), S. 2338 (112th Cong.), S. 3456 (112th Cong.) (each would authorize the use of administrative subpoenas in the investigation of unregistered sex offenders).

⁶ P.L. 112-206, amending, 18 U.S.C. 3486.

but not in terrorism or other cases.⁷ Critics suggest that administrative subpoena authority is little more than a constitutionally suspect “trophy” power, easily abused and of little legitimate use.⁸

More precisely, it might be said in favor of the use of administrative subpoenas in criminal investigations that they:

- provide a time-honored, court-approved means for agencies to acquire information in order to make well informed decisions;⁹
- should be available for terrorism investigations;¹⁰
- do not ordinarily require probable cause and consequently can be used from the beginning of an inquiry to gather information;¹¹
- can be used to gather information held by third parties other than the target of an inquiry;¹²
- often can encourage the cooperation of third parties by providing immunity for cooperation similar to that available in a judicial context;¹³
- often can make third parties subject to nondisclosure requirements thereby reducing the possibility that the target of an investigation will flee, destroy evidence, intimidate witnesses, or pose a risk to national security;¹⁴
- can be made judicially enforceable both to ensure compliance and to safeguard against abuse;¹⁵
- are less intrusive than search warrants; material is gathered and delivered by the individual rather than seized by the government; there is ordinarily an interval between the time of service of the subpoena and the time for compliance, allowing parties to consult an attorney;¹⁶
- can be more easily and quickly used than grand jury subpoenas, but are otherwise similar;¹⁷ and

⁷ E.g., *Senate Hearings I*, Prepared Statement of United States Principal Deputy Assistant Attorney General Rachel Brand; *Senate Hearings II*, Prepared Statement of United States Assistant Attorney General Daniel J. Bryant.

⁸ E.g., *Senate Hearings I*, Prepared Statement of Mr. James Robinson; *Housing Hearings*, Prepared Statement of Mr. Bob Barr.

⁹ Office of Legal Policy, United States Department of Justice, *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities (DoJ Report)*, 7 (2002), at http://www.justice.gov/archive/olp/rep_to_congress.htm.

¹⁰ E.g., *Senate Hearings I*, Prepared Statement of United States Principal Deputy Assistant Attorney General Rachel Brand.

¹¹ *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 201 (1946).

¹² E.g., *House Hearings*, Prepared Statement of United States Assistant Attorney General Daniel J. Bryant.

¹³ *Paine v. City of Lompoc*, 265 F.3d 975, 981 (9th Cir. 2001); *Scarborough v. Myles*, 245 F.3d 1299, 1305 (11th Cir. 2001)(witness immunity).

¹⁴ E.g., *House Hearings*, Prepared Statement of United States Assistant Attorney General Daniel J. Bryant.

¹⁵ E.g., *Senate Hearings I*, Prepared Statement of United States Principal Deputy Assistant Attorney General Rachel Brand.

¹⁶ *Cf., In re Grand Jury Subpoenas Dated December 10, 1987*, 926 F.2d 847, 854 (9th Cir. 1991)(distinguishing subpoenas from search warrants).

¹⁷ E.g., *Senate Hearings I*, Prepared Statement of United States Principal Deputy Assistant Attorney General Rachel Brand.

- are now available for investigations relating to some crimes and there is no obvious reason why they should not be available for other equally serious criminal investigations.¹⁸

On the other hand, it might be said that in the context of a criminal or foreign intelligence investigation that administrative subpoenas:

- are more likely to lead to unjustified intrusions of privacy;¹⁹
- in terrorism cases, seem to replicate and expand existing national security letter authority, without an explanation as to why additional authority is needed;²⁰
- lack the judicial safeguards that accompany the issuance of a search warrant, probable cause and issuance by a neutral magistrate, among other things;²¹
- generally lack the safeguards that accompany the issuance of a grand jury subpoena in that they ordinarily are not subject to a motion to quash or to the necessary participation of an Assistant United States Attorney;²²
- are distinguishable from grand jury subpoenas by the simple fact that the extensive powers available to the grand jury are justified in part by the fact that the grand jury is not the government but a buffer against the abuse of governmental authority;²³
- can be extremely expensive and disruptive for the person or entity to whom they are addressed long before the thresholds of overbreadth or oppression (the point at which a subpoena will not be enforced) are reached;²⁴
- are subject to easy abuse when they are issued against third parties who may have little interest in contesting their legitimacy;²⁵
- are subject to easy abuse when they are issued against third parties who are granted immunity from civil liability for the disclosures;²⁶
- are subject to easy abuse when they are issued against third parties who are subject to long term or permanent gag orders precluding disclosure to targets who might otherwise contest the abuse;²⁷ and
- are sought for their speed,²⁸ an environment in which mistakes often breed.²⁹

¹⁸ *Senate Hearings II*, Prepared Statement of Mr. Barry Sabin, Chief, Counterterrorism Section of the Criminal Division, United States Department of Justice.

¹⁹ E.g., *Senate Hearings I*, Prepared Statement of former United States Assistant Attorney General James Robinson.

²⁰ E.g., *House Hearings*, Prepared Statement of former Representative Bob Barr.

²¹ *Id.*

²² E.g., *Senate Hearings I*, Prepared Statement of former United States Assistant Attorney General James Robinson; *Senate Hearings II*, Prepared Statement of Professor Jonathan Turley.

²³ E.g., *Senate Hearings I*, Prepared Statement of former United States Assistant Attorney General James Robinson.

²⁴ E.g., *In re Grand Jury Proceedings*, 115 F.3d 1240, 1244 (5th Cir. 1997).

²⁵ E.g., *Senate Hearings I*, Prepared Statement of former United States Assistant Attorney General James Robinson.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Senate Hearings I*, Prepared Statement of United States Principal Deputy Assistant Attorney General Rachel Brand.

²⁹ *Senate Hearings I*, Prepared Statement of former United States Assistant Attorney General James Robinson.

Administrative Subpoenas Generally

At common law, a subpoena was a writ ordering an individual to appear before a court or tribunal, *sub poena* (under penalty) for failure to comply.³⁰ The writ might simply command the individual to appear *ad testificandum* (for purposes of testifying), or it might also include a clause instructing the witness to appear, again under penalty for his failure (*sub poena*), *duces tecum* (bringing with you [some designated item]).³¹ Testimonial subpoenas and subpoenas *duces tecum* remain a prominent feature of judicial proceedings to this day.

Administrative agencies have long held the power to issue subpoenas and subpoenas *duces tecum* in aid of the agencies' adjudicative and investigative functions. When Congress established the Interstate Commerce Commission, for example, it endowed the Commission with subpoena power:

“[F]or the purposes of this act the [Interstate Commerce] Commission shall have power to require the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation, and to that end may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section,” Interstate Commerce Act, §12, 24 Stat. 383 (1887).

There are now over 300 instances where federal agencies have been granted administrative subpoena power in one form or another.³² The statute granting the power ordinarily describes the circumstances under which it may be exercised: the scope of the authority, enforcement procedures, and sometimes limitations on dissemination of the information subpoenaed. In some instances, the statute may grant the power to issue subpoena *duces tecum*, but explicitly or implicitly deny the agency authority to compel testimony.³³ The statute may authorize use of the subpoena power in conjunction with an agency's investigations or its administrative hearings or both.³⁴ Authority is usually conferred upon a tribunal or upon the head of the agency. Although

³⁰ III BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 369 (1768)(transliteration supplied)(“With regard to parol evidence, or witnesses; it must first be remembered, that there is a process to bring them in by writ of subpoena *ad testificandum*: which commands them, laying aside all pretences and excuses, to appear at trial on pain of 100£ to be forfeited to the king....”).

³¹ *Id.* at 382 (“A second defect is of a nature somewhat familiar to the first: the want of a compulsive power for the production of books and papers belonging to the parties. In the hands of third persons they can generally be obtained by rule of court, or by adding a clause of requisition to the writ of subpoena, which is then called a subpoena *duces tecum*”).

³² *DoJ Report*, 5 (“Submissions from executive branch entities and legal research identified approximately 335 existing administrative subpoena authorities held by various executive branch entities under current law.”).

³³ *See, e.g., United States v. Iannone*, 610 F.2d 943, 945-47 (D.C.Cir.1979) holding that a statute that grants the authority “to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data” does not include the authority to compel the testimony of witnesses.

³⁴ *E.g.*, 7 U.S.C. 7808(a)(b) (captions omitted): “(a) The Secretary [of Agriculture] may conduct such investigations as the Secretary considers necessary for the effective administration of this chapter [relating to Hass avocado promotion, research and information], or to determine whether any person has engaged or is engaging in any act that constitutes a violation of this chapter or any order or regulation issued under this chapter.

“(b)(1) For the purpose of conducting an investigation under subsection (a) of this section, the Secretary may administer oaths and affirmations, subpoena witnesses, compel the attendance of witnesses, take evidence, and require the production of any records that are relevant to the inquiry. The production of the records may be required from any place in the United States.

“(2) For the purpose of an administrative hearing held under section 7806(a)(2) or 7807(c)(3) of this title [relating to hearings to contest orders issued under the chapter or penalties imposed for failure to comply with such orders], the presiding officer may administer oaths and affirmations, subpoena witnesses, compel the attendance of witnesses, take

some statutes preclude or limit delegation, agency heads are usually free to delegate such authority and to authorize its redelegation thereafter within the agency.³⁵

Some statutes contain a specific mechanism to protect the confidentiality of subpoenaed information,³⁶ others may rely upon the general proscriptions such as those that protect trade secrets,³⁷ or those found in the Privacy and Freedom of Information Acts.³⁸

Failure to comply with an administrative subpoena may pave the way for denial of a license or permit or some similar adverse administrative decision in the matter to which the issuance of the subpoena was originally related. In most instances, however, administrative agencies ultimately rely upon the courts to enforce their subpoenas. Generally, the statute that grants the subpoena power will spell out the procedure for its enforcement.³⁹

Objections to the enforcement of administrative subpoenas “must be derived from one of three sources: a constitutional provision; an understanding on the part of Congress ... or the general

evidence, and require the production of any records that are relevant to the inquiry. The attendance of witnesses and the production of the records may be required from any place in the United States.”

³⁵ E.g., 28 U.S.C. 510 (“The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any officer, employee, or agency of the Department of Justice of any function of the Attorney General”).

³⁶ E.g., 15 U.S.C. 796(d) (“Upon a showing satisfactory to the Federal Energy Administrator by any person that any energy information obtained under this section [which authorizes the use of subpoenas to collect energy information under the Energy Supply and Environmental Coordination Act and the Emergency Petroleum Allocation Act] from such person would, if made public, divulge methods or processes entitled to protection as trade secrets or other proprietary information of such person, such information, or portion thereof, shall be confidential in accordance with the provisions of section 1905 of Title 18; except that such information, or part thereof, shall not be deemed confidential for purposes of disclosure, upon request, to (1) any delegate of the Federal Energy Administrator for the purpose of carrying out this chapter and the Emergency Petroleum Allocation Act of 1973, (2) the Attorney General, the Secretary of the Interior, the Federal Trade Commission, the Federal Power Commission, or the General Accounting Office, when necessary to carry out those agencies’ duties and responsibilities under this and other statutes, and (3) the Congress, or any committee of Congress upon request of the Chairman”).

³⁷ 18 U.S.C. 1905 (“Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Office of Federal Housing Enterprise Oversight, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment”).

³⁸ 5 U.S.C. 552a and 5 U.S.C. 552, respectively. Other protective measures include those of the Right to Financial Privacy Act, 12 U.S.C. 3401 et seq.; the Health Insurance Portability and Accountability Act (HIPAA) regulations, 45 C.F.R. pt.2; the Electronic Communications Privacy Act, 18 U.S.C. 2701 et seq.; the Fair Credit Reporting Act, 15 U.S.C. 1681 et seq.; and the Family Educational Rights and Privacy Act, 20 U.S.C. 1232g.

³⁹ E.g., 7 U.S.C. 15 (“... In case of contumacy by, or refusal to obey a subpoena issued to, any person, the [Commodity Futures Trading] Commission may invoke the aid of any court of the United States within the jurisdiction in which the investigation or proceeding is conducted, or where such person resides or transacts business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. Such court may issue an order requiring such person to appear before the Commission or member or Administrative Law Judge or other officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question. Any failure to obey such order of the court may be punished by the court as a contempt thereof ...”).

standards governing judicial enforcement of administrative subpoenas,” *SEC v. Jerry T. O’Brien, Inc.*⁴⁰ Constitutional challenges arise most often under the Fourth Amendment’s condemnation of unreasonable searches and seizures,⁴¹ the Fifth Amendment’s privilege against self-incrimination,⁴² or the claim that in a criminal context the administrative subpoena process is an intrusion into the power of the grand jury and the concomitant right to grand jury indictment.⁴³

In an early examination of the questions, the Supreme Court held that the Fourth Amendment did not preclude enforcement of an administrative subpoena issued by the Wage and Hour Administration notwithstanding the want of probable cause, *Oklahoma Press Pub. Co. v. Walling*.⁴⁴ In the eyes of the Court:

The short answer to the Fourth Amendment objections is that the records in these cases present no question of actual search and seizure, but raise only the question whether orders of the court for the production of specified records have been validly made; and no sufficient showing appears to justify setting them aside. No officer or other person has sought to enter petitioners’ premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of court authorized by law and made after adequate opportunity to present objections, which in fact were made. Nor has any objection been taken to the breadth of the subpoenas or to any other specific defect which would invalidate them.⁴⁵

Neither the Fourth Amendment nor the unclaimed Fifth Amendment privilege against self-incrimination were thought to pose any substantial obstacle to subpoena enforcement:

Without attempting to summarize or accurately distinguish all of the cases, the fair distillation, in so far as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation, or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be particularly described, if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.⁴⁶

Congress had not expressly confined the Wage and Hour Administration’s subpoena power to instances where probable cause for inquiry existed. Moreover, far from taking offense at any perceived intrusion upon the prerogatives of the grand jury, proximity was thought to commend

⁴⁰ 467 U.S. 735, 741-42 (1984).

⁴¹ “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,” U.S. Const. Amend. IV.

⁴² “... nor shall any person ... be compelled in any criminal case to be a witness against himself....” U.S. Const. Amend. V.

⁴³ “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger....” U.S. Const. Amend. V.

⁴⁴ 327 U.S. 186 (1946).

⁴⁵ *Id.* at 195.

⁴⁶ *Id.* at 208.

rather than condemn the procedure. The Court considered the Administration akin to the grand jury whose searches end—rather than begin—with the discovery of probable cause.⁴⁷

A few years later, dicta in *United States v. Morton Salt Co.*⁴⁸ echoed the same message—the Fourth Amendment does not demand a great deal of administrative subpoenas addressed to corporate entities, “a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant. ‘The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.’”⁴⁹

Of course, Fourth Amendment reasonableness is most often an issue when there is a justifiable expectation of privacy, and Fifth Amendment self-incrimination only where an individual is compelled to speak. As the Court made clear, an individual can claim neither Fourth nor Fifth Amendment privileges to bar a subpoena for documents held by a bank or other third party nor to a right to notice of the subpoena’s demand.⁵⁰

A statute or conditions precedent to judicial enforcement, however, may require what the Constitution does not. Nevertheless when asked if the Internal Revenue Service (IRS) must have probable cause before issuing a summons for the production of documents, the Court intoned the standard often repeated in response to an administrative subpoena challenge:

Reading the statutes as we do, the Commissioner need not meet any standard of probable cause to obtain enforcement of his summons.... He must show [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the Commissioner’s possession, and [4] that the administrative steps required by the Code have been followed.... This does not ... mean[] that under no circumstances may the court inquire into the underlying reason for the examination. It is the court’s process which is invoked to

⁴⁷ *Id.* at 215 (“The result therefore sustains the Administrator’s position that his investigative function, in searching out violations with a view to securing enforcement of the act, is essentially the same as the grand jury’s ... and is governed by the same limitations. These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be limited by forecasts of the probable result of the investigation”).

⁴⁸ 338 U.S. 632, 652-53 (1950).

⁴⁹ In *Morton Salt Co.* the government had sought an injunction to enforce compliance with a Federal Trade Commission cease and desist order and the company had interposed a Fourth Amendment objection. The opinion may be colored by the Court’s view at the time of the limited Fourth Amendment rights available to corporate entities. “While they may and should have protection from unlawful demands made in the name of public investigation, corporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation ... Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and public interest,” *Id.* at 652.

⁵⁰ *SEC v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 742-43 (1984) (“A person inculpated by materials sought by a subpoena issued to a third party cannot seek shelter in the self-incrimination, and, whatever may be the pressures exerted upon the person to whom a subpoena is directed, the subpoena surely does not compel anyone else to be a witness against himself. If the target of an investigation by the SEC has no Fifth Amendment right to challenge enforcement of a subpoena directed at a third party, he clearly can assert no derivative right to notice when the Commission issues such a subpoena.... It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities.... These rulings disable respondents from arguing that notice of subpoenas issued to third parties is necessary to allow a target to prevent an unconstitutional search or seizure of his papers”).

enforce the administrative summons and a court may not permit its process to be abused.

United States v. Powell.⁵¹

The lower courts continue to look to principles articulated in *Oklahoma Press, Morton Salt*, and *Powell*, when called upon to enforce administrative subpoenas.⁵²

Administrative Subpoenas and the Grand Jury

Both sides of the debate find support in the law that surrounds the grand jury. Proponents of the use of administrative subpoenas in criminal cases point out that the courts have often analogized the administrative inquiry and subpoena power to the inquiries and powers of the grand jury. Opponents contend the grand jury's powers depend upon its unique and independent constitutional status, a foundation the administrative subpoena lacks.

The federal grand jury is certainly unique. It is a constitutionally acknowledged institution empowered to indict and to refuse to indict: "No person shall be held to answer for a capital, or otherwise infamous [federal] crime, unless on a presentment or indictment of a grand jury," U.S.Const. Amend.V. "[T]he whole theory of its function is that it belongs to no branch of the institutional government," but serves "as a kind of buffer or referee between the government and the people."⁵³

Nevertheless, the federal grand jury is attended by Justice Department attorneys who, through the use of subpoenas and subpoenas duces tecum, arrange for the presentation of evidence before it. Unlike the search warrant, there is no threshold of probable cause or similar level of suspicion that must be crossed before the grand jury subpoena can be issued. "[T]he grand jury can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not. It need not identify the offender it suspects, or even the precise nature of the offense it is investigating."⁵⁴

Its proceedings are conducted in secret and even attorneys for the witnesses who testify before it must await their clients outside the closed doors of the grand jury chamber.⁵⁵ The subpoena power upon which the grand jury relies, however, is the process of the court and may be enforced only

⁵¹ 379 U.S. 48, 57-8 (1964). In the IRS context, the court's process was not necessarily abused when employed to enforce an administrative summons issued for purposes of a criminal investigation, at least until the agency referred the matter to the Justice Department for prosecution, *United States v. LaSalle National Bank*, 437 U.S. 298 (1978). The IRS summons at issue in *LaSalle* had been served "solely for the purpose of unearthing evidence of criminal conduct," *Id.* at 299. Yet, since "Congress had not categorized tax fraud investigations into civil and criminal components, ... the primary limitation on the use of a summons occurs [only] upon the [IRS] recommendation of criminal prosecution to the Department of Justice." *Id.* at 311. Thereafter, the "likelihood that [government] discovery would be broadened or the role of the grand jury infringed" contrary to the intent of Congress "is substantial if post-referral use of the summons authority were permitted," *Id.* at 312.

⁵² *EEOC v. United Parcel Service, Inc.*, 587 F.3d 136, 139 (2d Cir. 2009)(internal quotation marks omitted)("To obtain enforcement of an administrative subpoena, an agency must show only [1] that the investigation will be conducted pursuant to a legitimate purpose, [2] that the inquiry may be relevant to the purpose, [3] that the information sought is not already within the agency's possession, and [4] that the administrative steps required have been followed"); *U.S. International Trade Commission v. ASAT, Inc.*, 411 F.3d 245, 253 (D.C.Cir. 2005); see also *EEOC v. Randstad*, 685 F.3d 433, 442 (4th Cir. 2012)("To obtain judicial enforcement of a subpoena, the EEOC need demonstrate only that (1) it is authorized to make such investigation; (2) it has complied with statutory requirements of due process; and (3) the materials requested are relevant"); *EEOC v. Federal Express Corp.*, 558 F.3d 842, 848 (9th Cir. 2009).

⁵³ *United States v. Williams*, 504 U.S. 36, 47 (1992).

⁵⁴ *Id.* at 48.

⁵⁵ F.R.Crim.P. 6; *United States v. Mandujano*, 425 U.S. 564, 581 (1976).

through the good offices of the court. “And the court will refuse to lend its assistance when the compulsion the grand jury seeks would override rights accorded by the constitution or even testimonial privileges recognized at common law.”⁵⁶

A subpoena is generally considered less intrusive than a warrant. The warrant authorizes an officer to enter, search for and seize, forcibly if necessary at a reasonable time of the officer’s choosing, that property to which the officer understands the warrant refers; the subpoena duces tecum instructs the individual to gather up the items described at his relative convenience and bring them before the tribunal at some designated time in the future. The validity of a warrant may only be contested after the fact; a motion to quash a subpoena can ordinarily be filed and heard before compliance is required.

There are at least two relatively uncommon exceptions to this general scheme of disparity. First, a subpoena may order “forthwith” compliance, demanding immediate appearance and delivery.⁵⁷ Second, while subpoenas ordinarily involve no bodily intrusions, grand jury subpoenas duces tecum have been issued for blood and saliva samples.⁵⁸ Even here, however, the individual served may choose not to comply and challenge the validity of the subpoena should the government seek judicial enforcement—an option the individual whose property is subject to a search warrant clearly does not have.

The Federal Rules of Criminal Procedure declare that grand jury subpoenas duces tecum may be neither unreasonable or oppressive,⁵⁹ a standard originally borrowed from the civil rules which are now much more expressive.⁶⁰ The criminal rule, which at a minimum is grounded in Fourth Amendment principles, is said to bar only the imprecise, overly burdensome, irrelevancy-seeking, or privilege-intrusive grand jury subpoena duces tecum. The Supreme Court demonstrated the deference owed the grand jury’s power of inquiry in *United States v. R. Enterprises, Inc.*⁶¹ It observed that a party seeking to quash a grand jury subpoena duces tecum bears the burden of establishing that a particular subpoena is unreasonable because it is unduly burdensome or because of its want of specificity or relevancy and that a motion to quash on relevancy grounds “must be denied unless there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury’s investigation.”⁶²

⁵⁶ *United States v. Williams*, 504 U.S. at 48.

⁵⁷ A “forthwith” subpoena is a subpoena directing the person to whom it is addressed to appear immediately either to testify or bring subpoenaed items with him. *E.g.*, *United States v. Triumph Capital Group, Inc.*, 211 F.R.D. 31 (D.Conn. 2002); *In re Grand Jury Subpoenas*, 926 F.2d 541 (9th Cir. 1991); *United States v. Sears, Roebuck & Co., Inc.*, 719 F.2d 1386 (9th Cir. 1983); *United States v. Lartey*, 716 F.2d 955 (2d Cir. 1983); see also, Beale, Bryson, et al., GRAND JURY LAW AND PRACTICE, §6:4 (2d ed. 2008) (“Forthwith subpoenas may be justified where there is a danger that evidence may be destroyed or altered or a witness may flee. The principal objection to the use of the forthwith subpoenas is that they deprive the subpoenaed party of the opportunity to consult with counsel and to challenge the validity of the subpoena before the time set for compliance”). Forthwith grand jury subpoenas are only to be used when an immediate response is justified and require the approval of the United States Attorney, *United States Attorneys’ Manual* §9-11.140 (1997).

⁵⁸ *In re Shabazz*, 200 F.Supp.2d 578 (D.S.C. 2002); *In re Grand Jury Proceedings Involving Vickers*, 38 F.Supp.2d 159 (D.N.H. 1998); *United States v. Nicolosi*, 885 F.Supp. 50 (E.D.N.Y. 1995); *In re Grand Jury Proceedings (T.S.)*, 816 F.Supp. 1196 (W.D.Ky. 1993); *Henry v. Ryan*, 775 F.Supp. 247 (N.D.Ill. 1991).

⁵⁹ F.R.Crim.P. 17(c)(2).

⁶⁰ F.R.Civ.P. 45(c).

⁶¹ 498 U.S. 292 (1991).

⁶² 498 U.S. at 301.

Criminal Administrative Subpoenas

Several statutes at least arguably authorize the use of administrative subpoenas primarily or exclusively for purposes of a criminal investigation. They are: (1) 21 U.S.C. 876 (Controlled Substances Act cases); (2) 18 U.S.C. 3486 (administrative subpoenas in certain health care fraud, child abuse, and Secret Service protection cases); and (3) 5 U.S.C. App.(III) 6 (inspector general investigations).⁶³ In addition, five statutory provisions vest government officials responsible for certain foreign intelligence investigations with authority roughly comparable to administrative subpoena access to various types of records.⁶⁴

Controlled Substances Act, 21 U.S.C. 876

The earliest of the three federal statutes, that are used extensively for criminal investigative purposes, appeared with little fanfare as part of the 1970 Controlled Substances Act, 84 Stat. 1272 (1970):

In any investigation relating to his functions under this subchapter with respect to controlled substances, listed chemicals, tableting machines, or encapsulating machines, the Attorney General may subpoena witnesses, compel the attendance and testimony of witnesses, and require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to the investigation....⁶⁵

In spite of its spacious language, the legislative history of Section 876 emphasizes the value of the subpoena power for administrative purposes—its utility in assigning and reassigning substances to the act’s various schedules and in regulating the activities of physicians, pharmacists, and the pharmaceutical industry—rather than as a criminal law enforcement tool:

Subsection (a) of this section authorizes the Attorney General to subpoena witnesses and compel their attendance and testimony in investigations relating to his functions under title II [relating to authority to control; standards and schedules]. He is also authorized to compel production of records or other tangible things which constitute or contain evidence and upon which he has made a finding as to materiality or relevancy. H.Rept. 91-1444, at 53 (1970).⁶⁶

Nevertheless, the Attorney General has delegated the authority to issue subpoenas under Section 876 to both administrative and criminal law enforcement personnel,⁶⁷ and the courts have approved their use in inquiries conducted exclusively for purposes of criminal investigation.⁶⁸

⁶³ The full text of each is appended. The characterization is “arguably” because both the Inspector General and controlled substance provisions were intended for, and are used extensively for, purposes other than criminal investigation.

⁶⁴ 18 U.S.C. 2709 (communications provider records); 12 U.S.C. 3414 (financial institution records); 50 U.S.C. 436 (same); 15 U.S.C. 1681v (credit agency records); 15 U.S.C. 1681u (same); the text of each is appended. Each authorizes use of the authority in connection with an investigation into “international terrorism,” a term ordinarily defined as violent criminal conduct with multinational aspects.

⁶⁵ 21 U.S.C. 876(a).

⁶⁶ See also, S.Rept. 91-613, at 29 (1969) (emphasis added) (“Section 606(a) authorizes the Attorney General to subpoena witnesses and compel their attendance and testimony *in hearings* relating to the control of controlled substances”).

⁶⁷ 28 C.F.R. App. to Pt.0 Subpt.R, §4.

⁶⁸ *United States v. Phibbs*, 999 F.2d 1053 (6th Cir. 1993); *United States v. Mountain States Tel. & Tel. Co.*, 516 F.Supp.

Section 876 authorizes both testimonial subpoenas and subpoenas duces tecum.⁶⁹ It provides for judicial enforcement; failure to comply with the court's order to obey the subpoena is punishable as contempt of court.⁷⁰ The section contains no explicit prohibition on disclosure.⁷¹

Even in the case of subpoenas issued during a criminal investigation, the courts have applied the traditional standards, worded one way or another, to convey the principle that a court must enforce an administrative subpoena that satisfies minimum statutory and constitutional prerequisites: "The critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; ... (3) whether the evidence is relevant and material to the investigation[; and (4) whether] Fourth Amendment 'reasonableness' [requirements have been] satisfied."⁷²

The subject of a criminal investigation lacks a reasonable expectation of privacy upon which to base a Fourth Amendment objection to an administrative subpoena directed to a third party.⁷³ In a criminal investigation, however, the cases suggest that Fourth Amendment probable cause and warrant prerequisites may apply, when execution of the administrative subpoena involves the attributes of a search.⁷⁴

Inspectors General, 5 U.S.C.App.(III) 6

The language of the Inspector General Act of 1978 provision is just as general as its controlled substance counterpart: "each Inspector General, in carrying out the provisions this act, is authorized ... to require by subpoena the production of all information ... necessary in the

225 (D.Wyo. 1981); *United States v. Hossbach*, 518 F.Supp. 759 (E.D.Pa. 1980).

⁶⁹ 21 U.S.C. 876(a).

⁷⁰ 21 U.S.C. 876(c).

⁷¹ The text of 21 U.S.C. 876 is appended.

⁷² *United States v. Golden Valley Electric Ass'n*, 689 F.3d 1108, 1113 (9th Cir. 2012); *United States v. Phibbs*, 992 F.2d 1053, 1077 (6th Cir. 1993)(internal quotation marks omitted)("Recipients of administrative subpoenas, such as those issued in accordance with 21 U.S.C. §876, are afforded certain protections under the Fourth Amendment to the United States Constitution. The subpoena has to be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance would not be unreasonable").

⁷³ *United States v. Golden Valley Electric Ass'n*, 689 F.3d at 1116 (electricity consumption records sought from the utility)("A customer ordinarily lacks a reasonable expectation of privacy in an item, like a business record, in which he has no possessory or ownership interest"); *United States v. Moffett*, 84 F.3d 1291, 1293 (10th Cir. 1996)("[The] defendant admits he has no reasonable expectation of privacy in the information on the train manifest—a business record of Amtrak" provided authorities pursuant to an administrative subpoena); *United States v. Phibbs*, 999 F.2d 1053, 1077 (6th Cir. 1993)("Here, the administrative subpoenas were not directed at Rojas, but rather at third party businesses. As a consequence, he did not have standing to dispute their issuance on Fourth Amendment grounds, unless he could demonstrate that he had a legitimate expectation of privacy attaching to the records obtained"); cf., *United States v. Harrington*, 761 F.2d 1482, 1485 (11th Cir. 1985).

⁷⁴ *United States v. Phibbs*, 999 F.2d at 1077 (internal quotation marks omitted), citing inter alia, *United States v. Lawson*, 502 F.Supp. 158, 165 (D.Md. 1980)("Should an on-premises search and inspection be required to execute the subpoena, a valid search warrant is needed as a condition precedent if consent is not forthcoming. If, as in the instant case, the subpoena is to be based upon 21 U.S.C. 876 and the purposes behind the search is a quest for evidence to be used in a criminal prosecution, a full probable cause showing is mandatory"); *United States v. Depew*, 992 F.Supp. 1209, 1213 (D.Mont. 1998)("In this case, a law officers entered the curtilage of defendant's home under the auspices of an administrative subpoena looking for incriminating evidence. The evidence sought concerned an individual who was the target of their investigation. This is an improper use of the administrative subpoena power. Under these circumstances, the law enforcement officers were required to making a showing of probable cause to a neutral magistrate").

performance of the functions assigned by this Act....”⁷⁵ Its legislative history supplies somewhat clearer evidence of an investigative tool intended for use in both administrative and criminal investigations:

Subpoena power is absolutely essential to the discharge of the Inspector and Auditor General’s functions. There are literally thousands of institutions in the country which are somehow involved in the receipt of funds from Federal programs. Without the power necessary to conduct a comprehensive audit of these entities, the Inspector and Auditor General could have no serious impact on the way federal funds are expended. . . .

The committee does not believe that the Inspector and Auditor General will have to resort very often to the use of subpoenas. There are substantial incentives for institutions that are involved with the Federal Government to comply with requests by an Inspector and Auditor General. In any case, however, knowing that the Inspector and Auditor General has recourse to subpoena power should encourage prompt and thorough cooperation with his audits and investigations.

The committee intends, of course, that the Inspector and Auditor General will use this subpoena power in the performance of its statutory functions. The use of subpoena power to obtain information for another agency component which does not have such power would clearly be improper.

[The committee recognizes that there is a substantial ongoing dispute about the propriety of so-called third party subpoenas: i.e., subpoenaing records of an individual which are in the hands of an institution, such as a bank. Since *U.S. v. Miller*, 425 U.S. 435 (1976), individuals have been regarded as having no protectable right of property with respect to their bank records. A law enforcement agency can obtain such records from a bank without any showing of cause to a neutral magistrate or any notice to the individual involved. The committee notes that progress has been made on legislation concerning financial privacy which would require notice to be given to an individual whose bank records are being obtained by a law enforcement agency. Hopefully, this progress will lead to legislation of general applicability to all law enforcement authorities, including Inspector and Auditor Generals].⁷⁶

The Justice Department reports that the “the Inspector General[’s administrative subpoena] authority is mainly used in criminal investigations,”⁷⁷ and the courts have held that “the Act gives the Inspectors General both civil and criminal investigative authority and subpoena powers coextensive with that authority.”⁷⁸ In either case, the Inspector General Act contains no explicit prohibition on disclosure of the existence or specifics of a subpoena issued under its auspices.⁷⁹

Subpoena authority under the Inspector General Act is delegable,⁸⁰ and subpoenas issued under the act are judicially enforceable.⁸¹ As is the case elsewhere, the court must enforce an inspector

⁷⁵ 5 U.S.C.App.(III) 6(a)(4).

⁷⁶ S.Rept. 95-1071, at 34 (1978)(footnote 7 of the committee report in brackets).

⁷⁷ *DoJ Report*, at 6.

⁷⁸ *United States v. Aero Mayflower Transit Co., Inc.*, 831 F.2d 1142, 1145 (D.C.Cir. 1987); *see also*, *Inspector General v. Banner Plumbing Supply Co., Inc.*, 34 F.Supp.2d 682, 688 (N.D.Ill. 1998); *United States v. Medic Housing, Inc.*, 736 F.Supp. 1531, 1535 (W.D.Mo. 1989).

⁷⁹ The text of 5 U.S.C.App. (III) 6 is appended.

⁸⁰ *United States v. Custodian of Records*, 743 F.Supp. 783, 786 (W.D.Okla. 1990); *Doyle v. U.S. Postal Service*, 771 F.Supp. 138, 140 (E.D.Va. 1991).

⁸¹ 5 U.S.C. App.(III) 6(a)(4)(“... which subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States District Court ...”); *Inspector General v. Banner Plumbing Supply Co., Inc.*, 34 F.Supp. 682, 686 (N.D. Ill. 1998); *University of Medicine and Dentistry v. Corrigan*, 347 F.3d 57, 63 (3d Cir. 2003).

general's administrative subpoena that complies with the authorizing statute and that is reasonable in the eyes of the Fourth Amendment.⁸²

Health Care, Child Abuse & Presidential Protection, 18 U.S.C. 3486

Unlike its companions, there can be little doubt that 18 U.S.C. 3486 is intended for use primarily in connection with criminal investigations. Section 3486 is an amalgam of four relatively recent statutory provisions—one, the original, dealing with health care fraud; one with child abuse offenses; one with threats against the President and others who fall under Secret Service protection; and one with sex offender registration. The first of these, the health care fraud provision, comes from the Health Insurance Portability and Accountability Act, where it caused little comment during consideration of the act.⁸³

The child abuse subpoenas, on the other hand, generated some illuminating commentary. Enacted as part of the Protection of Children from Sexual Predators Act,⁸⁴ and originally codified as 18 U.S.C. 3486A, the subpoena provision represented a compromise. The House version authorized a general subpoena power for use in the investigation of five federal child abuse offenses.⁸⁵ The version that ultimately passed, however, encompassed a wider range of federal child abuse statutes but only permitted subpoenas for the records of Internet and telephone communications providers. Senator Leahy, the ranking member of the Senate Judiciary Committee, explained this portion of the compromise during debate on the bill:

The House bill would have given the Attorney General sweeping administrative authority to subpoena records and witnesses [for] investigations involving crimes against children. This proposed authority to issue administrative subpoenas would have given federal agents the power to compel disclosures without any oversight by a judge, prosecutor, or grand jury, and without any of the grand jury secrecy requirements. We appreciate that such [secrecy] requirements may pose obstacles to full and efficient cooperation of federal/state task forces in their joint efforts to reduce the steadily increasing use of the Internet to perpetrate crimes against children, including crimes involving the distribution of child pornography. In addition, we understand that some U.S. Attorneys' Offices are reluctant

⁸² *University of Medicine and Dentistry v. Corrigan*, 347 F.3d 57, 64 (3d Cir. 2003)(internal quotation marks omitted)("A district court should enforce a subpoena if the agency can show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry is relevant, that the information demanded is not already within the agency's possession, and that the administrative steps required by the statute have been followed. The demand for information must not be unreasonably broad or burdensome"); *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 647 (5th Cir. 1999)("Courts will enforce an administrative subpoena if it (1) is within the agency's statutory authority; (2) seeks information reasonably relevant to the inquiry; (3) is not unreasonably broad or burdensome; and (4) is not issued for an improper purpose, such as harassment"); *United States v. California Rural Legal Assistance, Inc.*, 824 F.Supp.2d 31, 40 (D.D.C. 2011)("A court is compelled to enforce an administrative subpoena if it has been issued for a lawful purpose, the documents requested are relevant to that purpose, and the demand is reasonable and not unduly burdensome").

⁸³ P.L. 104-191, 110 Stat. 2018 (1996). The committee reports accompanying passage of the act make no mention of it other than to document its presence, S.Rept. 104-156 (1995); H.Rept. 104-496 (1996); H.Rept. 104-736 (1996); and the report on a corresponding bill containing identical language simply summarizes the content of the provision, H.Rept. 104-497, at 97 (1996).

⁸⁴ P.L. 105-314, 112 Stat.2984-985 (1998).

⁸⁵ See, H.Rept. 105-557, at 6-7(text)(1998); id. at 23 ("Under current law, federal law enforcement authorities may subpoena records in drug and health care fraud investigations without a court authorized subpoena.... The FBI has experienced difficulty in obtaining subpoenas in jurisdictions where U.S. attorneys lack sufficient resources to support an investigation of child pedophiles").

to open grand jury investigations when the only goal is to identify individuals who have not yet, and may never, commit a federal (as opposed to state or local) offense.

The Hatch-Leahy-DeWine substitute accommodates these competing interests by granting the Department a narrowly drawn authority to subpoena the information that it most needs: Routine subscriber account information from Internet Service Providers (ISP) which may provide appropriate notice to subscribers.⁸⁶

The compromise did not long survive. Buried in the omnibus funding bill for that year was a second child abuse section (18 U.S.C. 3486A) in addition to Section 3486.⁸⁷ In the following Congress when the Secret Service sought subpoena authority in presidential protection cases, its request and the authority in health care fraud and child abuse cases were merged into the language of general authority now found in Section 3486, and Section 3486A disappeared.⁸⁸ In the process, the demise of the compromise was scarcely mentioned,⁸⁹ but its legacy may live on in the form of the greater detail found in the revamped Section 3486.

Congress added the final piece to Section 3486 in the Child Protection Act of 2012.⁹⁰ It vests Section 3486's administrative subpoena power in the United States Marshals Service for use in tracking unregistered sex offenders.⁹¹

Section 3486 is both more explicit and more explicitly protective than either of its controlled substance or IG statutory counterparts. In addition to a judicial enforcement provision,⁹² it specifically authorizes motions to quash and ex parte nondisclosure court orders.⁹³ It affords those served a reasonable period of time to assemble subpoenaed material and respond,⁹⁴ and in the case of health care investigations the subpoena may call for delivery no more than 500 miles

⁸⁶ 144 *Cong. Rec.* 25240 (1998).

⁸⁷ P.L. 105-277, 112 Stat. 2681-72 (1998) ("Section 3486(a)(1) of title 18, United States Code, is amended by inserting 'or any act or activity involving a Federal offense relating to the sexual exploitation or other abuse of children,' after 'health care offense'").

⁸⁸ P.L. 106-544, 114 Stat. 2717 (2000).

⁸⁹ See, H.Rept. 106-669, at 11 n.11 (2000) ("Due to inconsistent acts of Congress, administrative subpoenas have been authorized in cases involving the sexual exploitation or abuse of children under both section 3486 and section 3486A. See, P.L. 105-77, Title I, §122 and P.L. 105-314, Title I, §606. Section 3486A lists specific crimes for which these subpoenas may be used while section 3486 does not. The authority under section 3486 is far more limited, however, and applies only when the subpoena is to be served on a provider of an 'electronic communication service' or 'remote computing service'").

⁹⁰ P.L. 112-206 (2012).

⁹¹ 18 U.S.C. 3486(a)(1)(A)(ii). See also H.Rept. 112-638, at 8-9 (2012) ("The Adam Walsh Child Protection and Safety Act of 2006 requires the Attorney General to use the Justice Department resources to assist jurisdictions in locating and apprehending sex offenders who fail to comply with registration requirements. The Marshals [service] is the primary agency charged with this responsibility. Under the Adam Walsh Act, the Marshals Services assists state, local, tribal, and territorial authorities in the location and apprehension of non-compliant sex offenders. It also investigates violations of the criminal provisions of the Adam Walsh Act.... Administrative subpoena authority will allow the Marshals to access hotel, rental car, or airline records quickly, before the trail goes cold on a fugitive sex offender").

⁹² 18 U.S.C. 3486(c). The text of 18 U.S.C. 3486 is appended.

⁹³ 18 U.S.C. 3486(a)(5), 18 U.S.C. 3486(a)(6)(A) ("A United State district court for the district in which the summons is or will be served, upon application of the United States, may issue an ex parte order that no person or entity disclose to any other person or entity (other than to an attorney in order to obtain legal advice) the existence of such summons for a period of up to 90 days. (B) Such order may be issued on a showing that the things being sought may be relevant to the investigation and there is reason to believe that such disclosure may result in—(i) endangerment to the life or physical safety of any person; (ii) flight to avoid prosecution; (iii) destruction of or tampering with evidence; or (iv) intimidation of potential witnesses. (C) An order under this paragraph may be renewed for additional periods of up to 90 days upon a showing that the circumstances described in subparagraph (B) continue to exist").

⁹⁴ 18 U.S.C. 3486(a)(2).

away.⁹⁵ In child abuse and presidential investigation cases, however, it imposes no such geographical limitation and it may contemplate the use of forthwith subpoenas.⁹⁶ It includes a “safe harbor” subsection that shields those who comply in good faith from civil liability;⁹⁷ and in health care investigations limits further dissemination of the information secured.⁹⁸

The authority of Section 3486 has been used fairly extensively.⁹⁹ Yet, the reported case law has been relatively sparse and follows the pattern of the controlled substance and inspector general subpoena cases. One of the first simply held that the subject of a record subpoenaed from a third party custodian has no standing to move that the administrative subpoena be quashed.¹⁰⁰ Others cite *Oklahoma Press*, *Powell* and *Morton Salt* for the proposition that administrative subpoenas under Section 3486 need not satisfy a probable cause standard.¹⁰¹ In one form or another, they endorse the general view that district courts must enforce administrative subpoenas that satisfy statutory requirements and conform to the reasonableness demands of the Fourth Amendment.¹⁰²

⁹⁵ 18 U.S.C. 3486(a)(3).

⁹⁶ 18 U.S.C. 3486(a)(9)(“A subpoena issued under paragraph (1)(A)(i)(II) or (1)(A)(ii)[child abuse or presidential protection cases] may require production as soon as possible, but in no event less than 24 hours after service of the subpoena”). It is unclear whether administrative subpoenas in health care cases are exempted from the general rule or the exception: administrative subpoenas in health care cases are not authorized to require production as soon as possible, or administrative subpoenas in health care cases may require immediate production without regard to the 24 hour limitation that applies in child abuse and presidential protection cases. The safer assumption is probably that the authority is unavailable in health care investigations, since the authority is extraordinary and the need for prompt action seems likely to arise more often in child abuse and Presidential protection cases.

⁹⁷ 18 U.S.C. 3486(d)(“Notwithstanding any Federal, State, or local law, any person, including officers, agents, and employees, receiving a subpoena under this section, who complies in good faith with the subpoena and thus produces the materials sought, shall not be liable in any court of any State or the United States to any customer or other person for such production or for nondisclosure of that production to the customer”).

⁹⁸ 18 U.S.C. 3486(e).

⁹⁹ The Justice Department reported that in the first full year after the section became effective in its current form United States Attorneys issued over 2100 administrative subpoenas under the authority of section 3486 and the FBI issued over 1800 in child abuse cases, *DoJ Report*, at 40–41. Whether due to novelty of the authority or other circumstances, no administrative subpoenas were issued under section 3486 to assist the Secret Service, *id.* at 41. As the Justice Department report observes, *DoJ Report*, at 6, the obligation to annually report on the use of the authority under section 3486 expired on December 19, 2003, 5 U.S.C. 551 note.

¹⁰⁰ *United States v. Daniels*, 196 F.R.D. 681, 683–84(D.Kan. 2000), citing *inter alia*, *United States v. Phibbs*, 999 F.2d 1053, 1077–78 (6th Cir. 1993), which reached the same conclusion with respect to an administrative subpoena under the controlled substance provision, 21 U.S.C. 876.

¹⁰¹ *United States v. Whispering Oaks Residential Car Facility, LLC*, 673 F.3d 813, 817 (8th Cir. 2012); *In re Administrative Subpoena*, 253 F.3d 256, 264–65 (6th Cir. 2001); *United States v. Bailey*, 228 F.3d 341, 347–50 (4th Cir. 2000).

¹⁰² *United States v. Whispering Oaks Residential Car Facility, LLC*, 673 F.3d at 817 (“It is well established that a subpoena is properly enforced if (1) issued pursuant to lawful authority, (2) for a lawful purpose, (3) requesting information relevant to the lawful purpose, and (4) the information sought is not unreasonable. If an agency has satisfied these requirements for an administrative subpoena, the burden shifts to the respondent to show that judicial enforcement would amount to an abuse of the court’s process”); *In re Administrative Subpoena*, 253 F.3d at 262 (“All the district court must do in deciding whether to enforce an administrative subpoena is 1) determine whether the administrative agency to which Congress has granted the subpoena power ... has satisfied the statutory prerequisites to issuing and enforcing the subpoena, and 2) determine whether the agency has satisfied the judicially created standards for enforcing administrative subpoenas”); *United States v. Bailey*, 228 F.3d at 349 (“In short, an investigative subpoena, to be reasonable under the Fourth Amendment, must be (1) authorized for a legitimate governmental purpose; (2) limited in scope to reasonably relate to and further its purpose; (3) sufficiently specific so that a lack of specificity does not render compliance unreasonably burdensome; and (4) not overly broad for the purpose of the inquiry as to be oppressive, a requirement that may support a motion to quash a subpoena only if the movant has first sought reasonable conditions from the government to ameliorate the subpoena’s breadth”).

Comparison

Of the three statutes that most clearly anticipate use of administrative subpoenas during a criminal investigation, Section 3486 is the most detailed. Neither of the others has a nondisclosure feature nor a restriction on further dissemination; neither has an explicit safe harbor provision nor an express procedure for a motion to quash. All three, however, provide for judicial enforcement reinforced by the contempt power of the court.

Only the controlled substance authority of 21 U.S.C. 876 clearly extends beyond the power to subpoena records and other documents to encompass testimonial subpoena authority as well.¹⁰³ The Inspector General Act speaks only of subpoenas for records, documents, and the like,¹⁰⁴ and has been held not to include testimonial subpoenas.¹⁰⁵ Section 3486 strikes a position somewhere in between; the custodian of subpoenaed records or documents may be compelled to testify concerning them, but there is no indication that the section otherwise conveys the power to issue testimonial subpoenas.¹⁰⁶

¹⁰³ 21 U.S.C. 876(a) (“... the Attorney General may subpoena witnesses, compel the attendance and testimony of witnesses, and require the production of any records ...”).

¹⁰⁴ 5 U.S.C.App.(III) 6(a)(4) (“... each Inspector General ... is authorized ... (4) to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence ...”).

¹⁰⁵ *Burlington Northern v. Office of Inspector General*, 983 F.2d 631, 641 (5th Cir. 1993); *see also, United States v. Iannone*, 610 F.2d 943, 945 (D.C.Cir. 1979)(construing identical language from an earlier IG statute to “negate the argument that in the exercise of his special subpoena power the Inspector General could compel Iannone to appear to give testimony”).

¹⁰⁶ 18 U.S.C. 3486(a)(1)(“... (B) Except as provided in subparagraph (C), a subpoena issued under subparagraph (A) may require—(i) the production of any records or other things relevant to the investigation; and (ii) testimony by the custodian of the things required to be produced concerning the production and authenticity of those things. (C) A subpoena issued under subparagraph (A) with respect to a provider of electronic communication service or remote computing service, in an investigation of a Federal offense involving the sexual exploitation or abuse of children shall not extend beyond—(i) requiring that provider to disclose the information specified in section 2703(c)(2), which may be relevant to an authorized law enforcement inquiry; or (ii) requiring a custodian of the records of that provider to give testimony concerning the production and authentication of such records or information”).

Appendix A. 21 U.S.C. 876. Subpoenas

(a) Authorization of use by Attorney General

In any investigation relating to his functions under this subchapter with respect to controlled substances, listed chemicals, tableting machines, or encapsulating machines, the Attorney General may subpoena witnesses, compel the attendance and testimony of witnesses, and require the production of any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material to the investigation. The attendance of witnesses and the production of records may be required from any place in any State or in any territory or other place subject to the jurisdiction of the United States at any designated place of hearing; except that a witness shall not be required to appear at any hearing more than 500 miles distant from the place where he was served with a subpoena. Witnesses summoned under this section shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(b) Service

A subpoena issued under this section may be served by any person designated in the subpoena to serve it. Service upon a natural person may be made by personal delivery of the subpoena to him. Service may be made upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering the subpoena to an officer, to a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. The affidavit of the person serving the subpoena entered on a true copy thereof by the person serving it shall be proof of service.

(c) Enforcement

In the case of contumacy by or refusal to obey a subpoena issued to any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which the investigation is carried on or of which the subpoenaed person is an inhabitant, or in which he carries on business or may be found, to compel compliance with the subpoena. The court may issue an order requiring the subpoenaed person to appear before the Attorney General to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey the order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in any judicial district in which such person may be found.

Appendix B. 5 U.S.C. App. III, 6. Authority of Inspector General; Information and Assistance from Federal Agencies; Unreasonable Refusal; Office Space and Equipment

(a) In addition to the authority otherwise provided by this Act, each Inspector General, in carrying out the provisions of this Act, is authorized—

(1) to have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act;

(2) to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are, in the judgment of the Inspector General, necessary or desirable;

(3) to request such information or assistance as may be necessary for carrying out the duties and responsibilities provided by this Act from any Federal, State, or local governmental agency or unit thereof;

(4) to require by subpoena the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act, which subpoena, in the case of contumacy or refusal to obey, shall be enforceable by order of any appropriate United States district court: Provided, That procedures other than subpoenas shall be used by the Inspector General to obtain documents and information from Federal agencies;

(5) to administer to or take from any person an oath, affirmation, or affidavit, whenever necessary in the performance of the functions assigned by this Act, which oath, affirmation, or affidavit when administered or taken by or before an employee of an Office of Inspector General designated by the Inspector General shall have the same force and effect as if administered or taken by or before an officer having a seal;

(6) to have direct and prompt access to the head of the establishment involved when necessary for any purpose pertaining to the performance of functions and responsibilities under this Act;

(7) to select, appoint, and employ such officers and employees as may be necessary for carrying out the functions, powers, and duties of the Office subject to the provisions of Title 5, United States Code, governing appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates;

(8) to obtain services as authorized by section 3109 of Title 5, United States Code, at daily rates not to exceed the equivalent rate prescribed for grade GS-18 of the General Schedule by section 5332 of Title 5, United States Code; and

(9) to the extent and in such amounts as may be provided in advance by appropriations Acts, to enter into contracts and other arrangements for audits, studies, analyses, and other services with public agencies and with private persons, and to make such payments as may be necessary to carry out the provisions of this Act.

(b)(1) Upon request of an Inspector General for information or assistance under subsection (a)(3), the head of any Federal agency involved shall, insofar as is practicable and not in contravention of any existing statutory restriction or regulation of the Federal agency from which the information is requested, furnish to such Inspector General, or to an authorized designee, such information or assistance.

(2) Whenever information or assistance requested under subsection (a)(1) or (a)(3) is, in the judgment of an Inspector General, unreasonably refused or not provided, the Inspector General shall report the circumstances to the head of the establishment involved without delay.

(c) Each head of an establishment shall provide the Office within such establishment with appropriate and adequate office space at central and field office locations of such establishment, together with such equipment, office supplies, and communications facilities and services as may be necessary for the operation of such offices, and shall provide necessary maintenance services for such offices and the equipment and facilities located therein.

(d) For purposes of the provisions of title 5, United States Code, governing the Senior Executive Service, any reference in such provisions to the “appointing authority” for a member of the Senior Executive Service or for a Senior Executive Service position shall, if such member or position is or would be within the Office of an Inspector General, be deemed to be a reference to such Inspector General.

(e)(1) In addition to the authority otherwise provided by this Act, each Inspector General appointed under section 3, any Assistant Inspector General for Investigations under such an Inspector General, and any special agent supervised by such an Assistant Inspector General may be authorized by the Attorney General to—

(A) carry a firearm while engaged in official duties as authorized under this Act or other statute, or as expressly authorized by the Attorney General;

(B) make an arrest without a warrant while engaged in official duties as authorized under this Act or other statute, or as expressly authorized by the Attorney General, for any offense against the United States committed in the presence of such Inspector General, Assistant Inspector General, or agent, or for any felony cognizable under the laws of the United States if such Inspector General, Assistant Inspector General, or agent has reasonable grounds to believe that the person to be arrested has committed or is committing such felony; and

(C) seek and execute warrants for arrest, search of a premises, or seizure of evidence issued under the authority of the United States upon probable cause to believe that a violation has been committed.

(2) The Attorney General may authorize exercise of the powers under this subsection only upon an initial determination that—

(A) the affected Office of Inspector General is significantly hampered in the performance of responsibilities established by this Act as a result of the lack of such powers;

(B) available assistance from other law enforcement agencies is insufficient to meet the need for such powers; and

(C) adequate internal safeguards and management procedures exist to ensure proper exercise of such powers.

(3) The Inspector General offices of the Department of Commerce, Department of Education, Department of Energy, Department of Health and Human Services, Department of Homeland Security, Department of Housing and Urban Development, Department of the Interior,

Department of Justice, Department of Labor, Department of State, Department of Transportation, Department of the Treasury, Department of Veterans Affairs, Agency for International Development, Environmental Protection Agency, Federal Deposit Insurance Corporation, Federal Emergency Management Agency, General Services Administration, National Aeronautics and Space Administration, Nuclear Regulatory Commission, Office of Personnel Management, Railroad Retirement Board, Small Business Administration, Social Security Administration, and the Tennessee Valley Authority are exempt from the requirement of paragraph (2) of an initial determination of eligibility by the Attorney General.

(4) The Attorney General shall promulgate, and revise as appropriate, guidelines which shall govern the exercise of the law enforcement powers established under paragraph (1).

(5)(A) Powers authorized for an Office of Inspector General under paragraph (1) may be rescinded or suspended upon a determination by the Attorney General that any of the requirements under paragraph (2) is no longer satisfied or that the exercise of authorized powers by that Office of Inspector General has not complied with the guidelines promulgated by the Attorney General under paragraph (4).

(B) Powers authorized to be exercised by any individual under paragraph (1) may be rescinded or suspended with respect to that individual upon a determination by the Attorney General that such individual has not complied with guidelines promulgated by the Attorney General under paragraph (4).

(6) A determination by the Attorney General under paragraph (2) or (5) shall not be reviewable in or by any court.

(7) To ensure the proper exercise of the law enforcement powers authorized by this subsection, the Offices of Inspector General described under paragraph (3) shall, not later than 180 days after the date of enactment of this subsection, collectively enter into a memorandum of understanding to establish an external review process for ensuring that adequate internal safeguards and management procedures continue to exist within each Office and within any Office that later receives an authorization under paragraph (2). The review process shall be established in consultation with the Attorney General, who shall be provided with a copy of the memorandum of understanding that establishes the review process. Under the review process, the exercise of the law enforcement powers by each Office of Inspector General shall be reviewed periodically by another Office of Inspector General or by a committee of Inspectors General. The results of each review shall be communicated in writing to the applicable Inspector General and to the Attorney General.

(8) No provision of this subsection shall limit the exercise of law enforcement powers established under any other statutory authority, including United States Marshals Service special deputation.

Appendix C. 18 U.S.C. 3486.

Administrative Subpoenas

(a) Authorization.—

(1)(A) In any investigation relating [to]—

- (i)(I) a Federal health care offense; or (II) a Federal offense involving the sexual exploitation or abuse of children, the Attorney General;
- (ii) an unregistered sex offender conducted by the United States Marshals Service, the Director of the United States Marshals Service; or
- (iii) an offense under section 871 or 879, or a threat against a person protected by the United States Secret Service under paragraph (5) or (6) of section 3056, if the Director of the Secret Service determines that the threat constituting the offense or the threat against the person protected is imminent, the Secretary of the Treasury, may issue in writing and cause to be served a subpoena requiring the production and testimony described in subparagraph (B).

(B) Except as provided in subparagraph (C), a subpoena issued under subparagraph (A) may require—

- (i) the production of any records or other things relevant to the investigation; and
- (ii) testimony by the custodian of the things required to be produced concerning the production and authenticity of those things.

(C) A subpoena issued under subparagraph (A) with respect to a provider of electronic communication service or remote computing service, in an investigation of a Federal offense involving the sexual exploitation or abuse of children shall not extend beyond—

- (i) requiring that provider to disclose the information specified in section 2703(c)(2), which may be relevant to an authorized law enforcement inquiry; or
- (ii) requiring a custodian of the records of that provider to give testimony concerning the production and authentication of such records or information.

(D) As used in this paragraph—

- (i) the term “Federal offense involving the sexual exploitation or abuse of children” means an offense under section 1201, 1591, 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423, in which the victim is an individual who has not attained the age of 18 years.
- (ii) the term “sex offender” means an individual required to register under the Sex Offender Registration and Notification Act (42 U.S.C. 16901 et seq.).

(2) A subpoena under this subsection shall describe the objects required to be produced and prescribe a return date within a reasonable period of time within which the objects can be assembled and made available.

(3) The production of records relating to a Federal health care offense shall not be required under this section at any place more than 500 miles distant from the place where the subpoena for the production of such records is served. The production of things in any other case may be required from any place within the United States or subject to the laws or jurisdiction of the United States.

(4) Witnesses subpoenaed under this section shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(5) At any time before the return date specified in the summons, the person or entity summoned may, in the United States district court for the district in which that person or entity does business or resides, petition for an order modifying or setting aside the summons, or a prohibition of disclosure ordered by a court under paragraph (6).

(6)(A) A United States district court for the district in which the summons is or will be served, upon application of the United States, may issue an ex parte order that no person or entity disclose to any other person or entity (other than to an attorney in order to obtain legal advice) the existence of such summons for a period of up to 90 days.

(B) Such order may be issued on a showing that the things being sought may be relevant to the investigation and there is reason to believe that such disclosure may result in—

- (i) endangerment to the life or physical safety of any person;
- (ii) flight to avoid prosecution;
- (iii) destruction of or tampering with evidence; or
- (iv) intimidation of potential witnesses.

(C) An order under this paragraph may be renewed for additional periods of up to 90 days upon a showing that the circumstances described in subparagraph (B) continue to exist.

(7) A summons issued under this section shall not require the production of anything that would be protected from production under the standards applicable to a subpoena duces tecum issued by a court of the United States.

(8) If no case or proceeding arises from the production of records or other things pursuant to this section within a reasonable time after those records or things are produced, the agency to which those records or things were delivered shall, upon written demand made by the person producing those records or things, return them to that person, except where the production required was only of copies rather than originals.

(9) A subpoena issued under paragraph (1)(A)(i)(II) or (1)(A)(iii) may require production as soon as possible, but in no event less than 24 hours after service of the subpoena.

(10) As soon as practicable following the issuance of a subpoena under paragraph (1)(A)(iii), the Secretary of the Treasury shall notify the Attorney General of its issuance.

(b) Service.—A subpoena issued under this section may be served by any person who is at least 18 years of age and is designated in the subpoena to serve it. Service upon a natural person may be made by personal delivery of the subpoena to him. Service may be made upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering the subpoena to an officer, to a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. The affidavit of the person serving the subpoena entered on a true copy thereof by the person serving it shall be proof of service.

(c) Enforcement.—In the case of contumacy by or refusal to obey a subpoena issued to any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which the investigation is carried on or of which the subpoenaed person is an inhabitant, or in which he carries on business or may be found, to compel compliance with the subpoena. The court may issue an order requiring the subpoenaed person to appear before the

Attorney General to produce records, if so ordered, or to give testimony concerning the production and authentication of such records. Any failure to obey the order of the court may be punished by the court as a contempt thereof. All process in any such case may be served in any judicial district in which such person may be found.

(d) Immunity from civil liability.—Notwithstanding any Federal, State, or local law, any person, including officers, agents, and employees, receiving a subpoena under this section, who complies in good faith with the subpoena and thus produces the materials sought, shall not be liable in any court of any State or the United States to any customer or other person for such production or for nondisclosure of that production to the customer.

(e) Limitation on use.—(1) Health information about an individual that is disclosed under this section may not be used in, or disclosed to any person for use in, any administrative, civil, or criminal action or investigation directed against the individual who is the subject of the information unless the action or investigation arises out of and is directly related to receipt of health care or payment for health care or action involving a fraudulent claim related to health; or if authorized by an appropriate order of a court of competent jurisdiction, granted after application showing good cause therefor.

(2) In assessing good cause, the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services.

(3) Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure.

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